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IN THE

Supreme Court of the United States

No. 872. October Term, 1934.

THE BASSICK MANUFACTURING COMPANY,
Plaintiff-Petitioner,

v.

THE R. M. HOLLINGSHEAD COMPANY,
Defendant-Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FRANK S. BUSSER,
LEONARD L. KALISH,
Counsel for Respondent.

CHARLES N. BURCH,
Of Counsel.

I. F. Huntzinger Co., *Appellate Printers,* Camden, N. J.

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SUMMARY.

Our opposition to this petition is based on the lack of any conflict of the decision of the Circuit Court of Appeals with any decision of any other Circuit Court of Appeals or (as alleged by petitioner) with its own earlier decision.

STATEMENT OF CASE.

The respondent **never** sold *couplers*. It sold two* *grease-guns*; one sold to Cumming and the other sold to Beezley.

*Two kinds or types of grease-guns.

Duplicate specimens of each of these two *grease-guns* is found in the record;—one specimen of each having been first introduced by defendant during the taking of depositions under the statute, and the other specimen having been subsequently introduced by plaintiff through affidavits introduced during the trial by stipulation.

The (duplicate) specimens of the *grease-gun* sold to *Cumming* are found in the record as:

Defendant's Exhibit 6, parts A, B and C,

and

Plaintiff's Exhibit A attached to Cumming affidavit.

The (duplicate) specimens of the *grease-gun* sold to *Beezley* are found in the record as:

Defendant's Exhibit 8, parts A, B, D and E, and Exhibit 41

and

Plaintiff's Exhibit A attached to Beezley affidavit.

Each of these two *grease-guns* (which for convenience may be designated as the "Cumming grease-gun" and the "Beezley grease-gun," respectively) includes or comprises a **reciprocatory-piston** type pump (or compressor), a hose and a bayonet type coupler.

The structural details of the coupler parts of these two *grease-guns* are somewhat different, as are the structural details of the pump parts.

Except as hereinafter qualified, we accept the following statement in Petitioner's brief (p. 18):

> "On behalf of the petitioner we have always asserted claims 1, 2, 3, 4, 5, 6, 8 and 10 to be limited to couplers of the 'suction effect' type. We adhere to that view. The Hollingshead Company has always entertained and expressed the same view. The opinion of the Sixth Circuit Court of Appeals entered November 14, 1934, is based upon and expresses the same view. Everybody concerned has, therefore, entertained

the same understanding of these claims, and still entertains the same understanding."

It will be noted that petitioner accepts the finding of the Circuit Court of Appeals that the *grease-gun* sold to Cumming, embodying (as is admitted by plaintiff) a "**non**suction-effect" coupler, does **not** infringe **any** of the claims;—even claims 14 and 15 which plaintiff-petitioner contended are not limited to this "suctional" feature, but which the Circuit Court of Appeals held must be so limited in order to be valid.

Petitioner's brief states (pp. 17 and 18):

> "The coupler sold to Cumming was not of the 'suction' type. * * * The other type of coupler,—sold by Hollingshead to Beezley had a 'suction-effect' coupler."

The Court of Appeals also found **as a fact** that the *grease-gun* sold to Beezley is likewise **not** possessed of the "suction-effect"; and, therefore, likewise does **not** infringe **any** of the claims.

This Court is asked to review merely this finding of fact. The finding was based on **uncontradicted** expert testimony* and upon the independent judgment of the Court as to the construction and mode of operation of the Beezley *grease-gun.*

As the petitioner's brief says (pp. 30 and 32):

> "The petitioner did not in the trial of this case undertake to introduce the testimony of any expert witnesses. * * * The Hollingshead Company, on the other hand, did introduce expert testimony."

What was the character of the Beezley *grease-gun* that persuaded the Court to accept the uncontradicted testimony of respondent's witness as to its mode of operation?

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* On pages 196 to 199, inclusive, and pages 227 and 228 of the record.

It may be conceded*, as petitioner so elaborately argues in its brief, that the coupler part, *per se,* of the Beezley *grease-gun* would have been capable, **if combined with a pump of a different type,** of having a so-called "suction-effect." This is not in issue and therefore need not be disputed or considered. However, the clear and uncontroverted evidence showed, and respondent contended, that respondent's coupler is an integral part of a *grease-gun* in which the pump part is of the **reciprocatory-piston type,** and that in such combination the coupler could **not** have any "suction-effect."† The Circuit Court of Appeals so held.

Throughout petitioner's brief, petitioner takes the unwarranted liberty of assuming that respondent's alleged infringing structure is the coupler part of the Beezley *grease-gun* associated with a pump or compressor of the conventional **screw-actuated-piston** type shown in the patent in suit. Thus, in the foot note on page 20, petitioner states:

> "In all of these drawings the compressor part of the *combination* is shown in a conventional or diagrammatic manner." (Italics ours.)

But petitioner has no right to do this. The mode of operation of respondent's coupler part depends on the type of pump with which it is combined. There is no dispute that when respondent's coupler is combined with the peculiar and distinctive type of pump with which, in respondent's structure, it **is** combined, it does **not** and can **not** have the mode of operation which it conceivably might have in the purely *hypothetical* combination which the

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* This is conceded merely for purposes of argument, but not admitted, because the evidence shows that **NO** "suction-effect" can be produced with the type of pump used by defendant-respondent in its **GREASE-GUNS** regardless of the construction of the coupler part.

† Regardless of the construction of the coupler per se.

petitioner, wholly without excuse, seeks to substitute for the actual combination* that respondent sold.

The petitioner wholly fails to show that in any other case decided by a federal appellate court the combination held to be an infringement of claims 1, 2, 3, 4, 5, 6, 8 and 10 was the combination which in the present case was held not to be an infringement of these claims.

In all other cases that have been decided in the federal appellate courts with respect to these so-called "suction-effect" claims 1, 2, 3, 4, 5, 6, 8 and 10, the pump was of such construction that the coupler could have a "suction-effect." In respondent's combination the pump is of such construction that the coupler could **not** have a "suction-effect."†

There is no dispute between the parties as to the proper construction of the claims. This Court is asked to review solely a finding of fact with respect to the mode of operation of a *grease-gun*‡ that was never involved in any other litigated case decided by a federal appellate court with respect to claims 1, 2, 3, 4, 5, 6, 8 and 10;—to which claims petitioner has expressly limited its petition for writ of certiorari.§

This Court is asked to review a finding of fact which accords with undisputed testimony as to mode of operation

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* The GREASE-GUN sold to Beezley.

† Regardless of the construction of the coupler, per se.

‡ Pump, hose and coupler.

§ While NO appellate court has ever held a GREASE-GUN like the Beezley GREASE-GUN in the present case to be an infringement of the Gullborg "suction-effect" claims 1, 2, 3, 4, 5, 6, 8 and 10; the Circuit Court of Appeals for the Second Circuit in Bassick v. Adams, 52 Fed. 2d, 36, and the Circuit Court of Appeals for the Third Circuit in Rogers v. Alemite, 74 Fed. 2d, 1019, have held that "NON-suction-effect" GREASE-GUNS, (in legal effect the same as the Cummings GREASE-GUN and the Beezley GREASE-GUN in the present case) constituted contributory infringement of Gullborg claims 14 and 15. However, in the present case, plaintiff-petitioner has **ACCEPTED** the adverse decision of the Circuit Court of Appeals for the Sixth Circuit on this question of the scope and/or validity of claims 14 and 15, and has therefore **CONCEDED THE CORRECTNESS** of the decision of the Circuit Court of Appeals for the Sixth Circuit on this question, in the present case.

that was never submitted in any other case and that could not have been submitted in any other case.

The petition for rehearing of the decision of the Circuit Court of Appeals attacked precisely the same finding of fact which this Court is now asked to review.

We submit that this Court should not review a finding of fact as to the mode of operation of a construction that has never been involved in other litigated cases. Such finding of fact—whether right or wrong—does not, we submit, justify the petitioner in asking the Court to grant the writ.

In the event that the Court should deem it incumbent upon it to consider the correctness of this finding of fact, further reference may be made to the Appendix, in which the construction and mode of operation of respondent's grease-gun and the evidence relating thereto are discussed more in detail.

Respectfully submitted,

FRANK S. BUSSER,
LEONARD L. KALISH,
Counsel for Respondent.

CHARLES N. BURCH,
Of Counsel.

APPENDIX.

The petition for writ of certiorari proceeds in disregard of the clear and uncontroverted evidence in the case, and appears to be based merely upon counsel's repeated offer to substitute for the evidence in the record, some demonstrations* which counsel has devised outside the testimony adduced in the trial court, which demonstrations would not be subject to the essential safeguards of cross-examination and would clearly be *de hors* the record.

The Circuit Court of Appeals has **not** erred as to any question of fact involved in its opinion of November 14, 1934.

Petitioner, in its petition for writ of certiorari (just as in its earlier briefs and arguments before the Circuit Court of Appeals) endeavors to overcome the facts established by the clear and uncontroverted evidence in the record† by suggestions of new demonstrations and new mechanical theories and contentions evolved and presented solely by counsel subsequent to the trial of the case and not made a part of the record in the trial court.

Anent respondent's "Beezley grease-gun" and also exemplified by Defendant's Exhibits 8 (parts A, B, D and E) and 41‡:

The "Beezley *grease-gun*" is a sample of respondent's large garage type *grease-gun*, sometimes known as a

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* Middle of page 32 of petitioner's brief.

† Pages 196 to 199, inclusive, and pages 227 and 228 of record.

‡ Parts A, B, D and E of Defendant's Exhibit 8 are the pump; short metallic hose; reservoir tank and long fabric hose parts, respectively, of the "Beezley GREASE-GUN";—while Defendant's Exhibit 41 is the coupler part of the "Beezley GREASE-GUN."

"service" *grease-gun*, a specimen of which was introduced during the taking of testimony (under R. S. 863), on behalf of respondent, as Defendant's Exhibits 8 (parts A, B, D and E) and 41.

The only evidence in the record* is to the effect that respondent's large "service" *grease-gun* is inherently of such a construction as makes it **impossible** to produce any so-called "suction-effect" or "self-cleansing" action in the coupler part of the *grease-gun* at the moment of disunion from the "fitting."

Petitioner in its argument first divorces the coupler part of respondent's *grease-gun* in question, from the pump part of such *grease-gun*, and then re-combines such divorced coupler part of respondent's *grease-gun*, with a totally different type of pump (which respondent is **not** charged with having made, used or sold), and then proceeds to argue that the so-called "suction-effect" or "self-cleansing" action *may* be produced in such **hypothetical** "combination" of the divorced coupler part of respondent's "service" *grease-gun* with the other kind of pump disclosed in the Gullborg patent.†

The Court need not consider (as it is no part of this present case) whether the coupler part of respondent's "service" *grease-gun*, in any **hypothetical** "combination" with a totally different kind of pump element (such as illustrated particularly in the drawings of the Gullborg patent in suit) would or would not be capable of producing the so-called "suction" effect or "self-cleansing" action, as respondent is not charged with having sold any such *grease-gun* "combinations" as **hypothetically** presented by petitioner in its petition and brief before this Court.

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* Pages 196 to 199, inclusive, and pages 227 and 228 of record.

† Respondent has **NOT** been charged with any such **HYPOTHETICAL** "combination" and the record does not show that such **HYPOTHETICAL** "combination" ever had any real or potential existence.

The **only** *grease-gun* unit* which respondent is charged to have sold to Beezley, is respondent's large "service" type *grease-gun* unit exemplified by plaintiff's "Beezley Exhibit A," and also exemplified by Defendant's Exhibits 8 and 41, and the testimony of the expert (which was not controverted) is to the effect that the normal (and any possible) operation of this *grease-gun* unit produces a pressure in the coupler part many hundred times greater than the very slight amount of vacuum or "suction" which could possibly be produced within the coupler element, and that this much larger *pressure cannot be relieved* prior to disunion, by virtue of the inherent construction and the inevitable mode of operation of this *grease-gun* unit, and that upon repeated applications of this *grease-gun* unit to so-called "fittings" or grease-cups (and corresponding disunions), this respondent's *grease-gun* unit produced no "suction" or "self-cleansing," but, on the contrary, produced a substantial exudation of grease upon each and every disunion.

Therefore, in holding that the "suctional" or "self-cleansing" claims 1, 2, 3, 4, 5, 6, 8 and 10 of the Gullborg patent in suit were **not** infringed by either of the two respondent's *grease-guns*, the Circuit Court of Appeals decided wholly in accordance with all the evidence in the case.

In this connection, it may be noted that the pump part or element of each of the *grease-guns* held by the same Appellate Court to constitute infringements (of the "suctional" or "self-cleansing" claims) in all the cases decided in *Lyman, et al., v. Bassick,* 18 Fed. (2d) 29, were the kind of pumps by or through which the pressure could be relieved prior to disunion and which therefore did afford

* A "grease-gun" comprising generally a combination of a pump, a hose and a coupler.

opportunity for the development of the so-called "suctional" or "self-cleansing" effect in the coupler part of these *grease-gun* "combinations" at the moment of disunion. This is not so, however, in respondent's "service" type *grease-gun* unit sold to Beezley.

Thus, in all the cases before the Circuit Court of Appeals in *Lyman, et al., v. Bassick* (18 Fed. (2d) 29), as well as in counsel's **hypothetical** "combination" upon which petitioner's petition for writ of certiorari is based, the pump part of the *grease-gun* unit was and is of the conventional **screw-advanced-piston** type of pump (of the same kind as disclosed in the Gullborg patent in suit) wherein **no check-valve** (a one-way valve) is necessary for the operation of the pump, and wherein the pressure *may* therefore be relieved prior to the disunion of the coupler element (of the *grease-gun*) from the "fitting" by merely retracting the **screw-advanced-piston** by turning the screw-handle back a turn or so.

On the other hand, however, the pump element of respondent's "service" type *grease-gun* unit, is of the type wherein the grease is successively subjected to two different pressures (successively increasing). The low pressure is produced by a hundred to two hundred pounds of air constantly maintained on the grease supply (in the large tank which rests on the floor) while the high pressure is produced by a **reciprocatory-piston** operating within a cylinder (connected with the tank through a long hose about 1½ inches thick).

The evidence is clear to the effect that the **pressure** produced in the coupler element (either by the manual pumping operation or by the air pressure) **cannot be relieved** prior to disunion because the retraction of the pump piston has no appreciable effect on the pressure in the coupler part, because of the check-valve which is inter-

mediate the coupler part and the high-pressure **reciprocatory-piston** (which check-valve is a necessary element for the operation of all pumps of this "reciprocatory" type) and because even if the check-valve were removed (rendering the device thereafter inoperative and useless) and the piston then retracted, the air pressure of a hundred to two hundred pounds would still be transmitted to the coupler part and that pressure alone is hundreds of times greater than the slight amount of vacuum that could possibly be produced within any coupler;—giving a net result of a substantial pressure instead of any "suction."

CONCLUSION.

It is, therefore, apparent that the Circuit Court of Appeals did **not** err on any question of fact as shown by the record, but that the alleged question of fact which petitioner again attempts to raise by its petition for writ of certiorari is not a question of fact at all, but merely concerns a hypothetical device or a hypothetical "combination" and possibly some new demonstrations, new mechanical theories and contentions, presented or advanced for the first time since the trial and never presented in the lower court through evidence, and is wholly *de hors* the record, and that the petition for writ of certiorari must, therefore, be denied for the additional reason that it is without foundation in the record.

Respectfully submitted,

FRANK S. BUSSER,
LEONARD L. KALISH,
Counsel for Respondent.

CHARLES N. BURCH,
Of Counsel.